No. 76-1354

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE A. ANGLE, D/B/A KANSAS REFINED HELIUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A25-A69), adjudging petitioner in civil contempt, is reported at 547 F. 2d 575. The report of the Special Master (Pet. App. A1-A24) is unreported. The opinion of the court of appeals in the earlier enforcement proceeding is reported at 445 F. 2d 237, certiorari denied, 404 U.S. 1039; the Board's decision and order are reported at 176 NLRB 1032.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1976 (Pet. App. A25, A63-A66), and was amended

on January 4, 1977 (Pet. App. A67-A69). The petition for a writ of certiorari was filed on April 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly found, contrary to the report of its Special Master, that the petitioner-employer was in civil contempt of the court's prior decree, enforcing unfair labor practice orders of the National Labor Relations Board.

2. Whether the provisions of the court's order with respect to posting and mailing of notices and bargaining with the union are appropriate measures for eradicating the effects of the employer's contumacious conduct.

STATUTES AND RULES INVOLVED

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are:

Sec. 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees * * *.

2. The relevant provisions of the Federal Rules of Civil Procedure are:

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury * * * the court shall find the facts specially and state separately its conclusions of law thereon. * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. * * *

Rule 53. Masters.

(e) Report.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. * * *

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. * * *

STATEMENT

A. The Enforcement Proceedings

On May 27, 1971, the court of appeals sustained the findings of the National Labor Relations Board that petitioner[1] (hereafter referred to as "Angle") had violated Section 8(a)(1), (3), (4) and (5) of the National Labor

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[1]George A. Angle, d/b/a Kansas Refined Helium Company.

Relations Act and enforced the Board's order. The court's decree, entered on September 10, 1971, required Angle, *inter alia*, to cease and desist from discharging or otherwise discriminating against employees to discourage membership in the Oil, Chemical and Atomic Workers International Union, AFL-CIO (the "Union"), or any other labor organization; coercively interrogating employees about their union activities or sympathies or the union activities and sympathies of others; threatening to close the plant because of the employees' union activities; granting wage increases to discourage employee adherence to or activities on behalf of any labor organization; refusing to bargain collectively with the Union; and "in any other manner" interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7. Affirmatively, the decree required Angle, *inter alia*, to offer reinstatement to employee Arel Rodgers to his former or substantially equivalent position without prejudice to his seniority and other rights and privileges, and, upon request, to bargain collectively with the Union.

B. The Contempt Proceedings

On July 11, 1972, the Board commenced civil contempt proceedings against Angle for failing and refusing to comply with the court's decree of September 10, 1971. As finally amended, the Board's petition alleged that Angle had violated the court's decree by engaging in various acts of interference, restraint, and coercion of its employees; by failing properly to reinstate Arel Rodgers in March 1972; by subsequently discharging Rodgers and three other employees (Hilary Luft, Brian Brack and Harold Straub) after the court of appeals had ordered their reinstatement pending completion of the contempt proceeding; and by implementing certain changes in employees' working conditions without affording the

Union adequate notice and a reasonable opportunity to bargain about such changes (Pet. App. A2-A6).

On January 12, 1973, the court of appeals designated a Special Master to hear evidence and make recommended findings of fact and conclusions of law. The testimony of witnesses was taken on various dates in November 1973 and January 1974. On March 11, 1975, the Special Master filed his report recommending that Angle be absolved of all charges of civil contempt (Pet. App. A1-A24).

The Board filed exceptions to the Master's report, and, on June 7, 1976, the court of appeals issued its decision overruling in large part the Master's findings and conclusions (Pet. App. A25-A66). The court recognized that, "[u]nder rule 53(e)(2) of the Federal Rules of Civil Procedure, a court must accept the findings of fact of a master unless 'clearly erroneous' " (Pet. App. A27-A28), that in the District of Columbia Circuit the "clearly erroneous" standard applies "even to findings based on documentary evidence or inferences from undisputed facts" (Pet. App. A28), and that "[t]he party excepting to the master's findings carries the burden of proving them to be clearly erroneous" (*ibid.*). The court found, however, that the Board had met its burden in establishing that most of the Master's findings were clearly erroneous.

Specifically, the court of appeals found that Angle had violated the Act and the court's decree by unilaterally changing employees' insurance coverage and eliminating bargaining unit work; by engaging in surveillance of union activities; by threatening that he would go to jail rather than sign a union contract, that employees would not receive raises on account of the Union, and that he would go out of business or close the plant on account of the Union; and by denigrating the efficacy

of Board orders. The court further found that Rodgers had been improperly reinstated in March 1972, that he and Luft were improperly discharged in July 1972, and that Straub was unlawfully discharged in December 1972 (Pet. App. A31-A55, A47-A62).

The court of appeals declined, however, to overturn the Master's finding that Brack had been lawfully discharged for improper performance of his duties, stating that "[t]his finding has evidentiary support" (Pet. App. A56). It also declined to order the reinstatement of Rodgers and Luft on the grounds that they had engaged in misconduct following their temporary reinstatement in September 1972. The court particularly noted that, since "the Master had the opportunity to observe Rodgers' and Luft's demeanor in testifying, we cannot say that his findings [with respect to their misconduct] were clearly erroneous" (Pet. App. A68).

The court of appeals ordered Angle, *inter alia*, to cease and desist from making changes in wages and working conditions without providing the Union with notice and a reasonable opportunity to bargain over such changes, and to sign, post, and mail to employees notices in a form prescribed by the Board stating that he had been adjudicated in civil contempt and that he would take the action in purgation ordered by the court (Pet. App. A63-A66, A70-A73).

ARGUMENT

1. There is no substance to petitioner's contention (Pet. 4-5) that the court of appeals applied an improper standard of review to the Special Master's findings. As shown (*supra*, p. 5), the court expressly adopted the "clearly erroneous" standard for reviewing the Master's findings urged by petitioner here. Moreover, contrary

to petitioner's assertions, the court did not improperly overturn credibility resolutions made by the Master (Pet. 8-10),[2] nor did it fail to afford proper deference to the Master's inferences (Pet. 10-12).[3] And, where the Master failed to make findings on particular material issues, the court merely followed the well-established rule that a reviewing court may examine the record itself if "the record is so clear that the court does not need the aid of findings" (Pet. App. A29). *Hurwitz* v. *Hurwitz*, 136 F. 2d 796, 799 (C.A. D.C.); *English Town of Huntington*, 448 F. 2d 319, 321 (C.A. 2). See, generally, 5A Moore's *Federal Practice*, para. 52.06[2] (pp. 2720-2723), para. 53.13[2] (pp. 3031-3032) and n. 8 (2d ed.).

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[2]Thus, the court overturned the Master's conclusions with respect to the unilateral reorganization at the plant, not because of differences with the Master over credibility issues, but because the Master applied erroneous legal principles and ignored convincing uncontroverted record evidence (Pet. App. A33-A36). Similarly, the court did not overturn the Master's credibility resolutions in accepting the testimony of Brian Brack with respect to certain coercive statements. Rather, as the court pointed out (Pet. App. A43), Brack's testimony in this regard was uncontroverted and not discredited by the Master. And the court made no finding respecting reports on Rodgers while he was working at the plant (Pet. App. A41, n. 10). Indeed, where credibility resolutions were involved, the court gave due deference to the Master's findings—*e.g.*, it accepted the Master's finding that Brack's discharge was lawful, and refused, on the basis of the Master's credibility findings, to grant reinstatement to Rodgers and Luft (Pet. App. A56-A57, A68).

[3]The examples of "error" cited by petitioner merely are instances where the Master's inferences themselves were clearly erroneous or were based on underlying factual findings which were clearly erroneous (Pet. App. A33-A36, A50-A55). The court's observation that a reviewing court will accord more weight to the inferences of the Board than to those of a Master (Pet. 11-12) is a correct statement of the law. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 485, n. 21, 488.

Finally, the court's view that "a master's conclusions of law are entitled to no special deference from the reviewing court, and will be overturned whenever they are believed to be erroneous" (Pet. App. A28-A29) is in accord with well-established authority. See, *e.g.*, *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 526; *Case* v. *Morrisette*, 475 F. 2d 1300, 1308, and cases cited at n. 39 (C.A. D.C.). See generally, 5A Moore's *Federal Practice*, para. 53.12[5] (p. 3021) (2d ed.).[4] Moreover, even if the court were required to accept "permissible," rather than "correct," interpretations of law by the Master, it did not err in overturning the Master on the issues cited by petitioner (Pet. 12-15).[5]

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[4]Petitioner's reliance (Pet. 12) on *United States* v. *Hunt*, 513 F. 2d 129 (C.A. 10), in support of its assertion that a Master's interpretations of law must be upheld if merely "permissible" rather than "correct," is misplaced. *Hunt* involved the special situation where an "interpretation of state law" is involved, "there are no state decisions on point or none which provide a clear precedent," and the district court judge is a "resident of the state where the controversy arose" (*id.* at 136).

[5]Thus, contrary to petitoner's contention (Pet. 12-13), it is settled beyond dispute that willfulness need not be established as an element in civil contempt proceedings. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191, and cases cited by the court at Pet. App. A30-A31 and n. 5. *Schauffler* v. *Local 1291, Internat'l Longshoremen's Ass'n*, 292 F. 2d 182 (C.A. 3), relied upon by petitioner (Pet. 13, n. 4), is inapposite. The issue in that case was the burden of proof required for civil contempt, not whether "willfulness" was required (*id.* at 189-190). To the extent that *National Labor Relations Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344 (C.A. 5), requires a showing of willfulness, it is contrary to *McComb* and is no longer followed in the Fifth Circuit. See, *e.g.*, *National Labor Relations Board* v. *Whittier Mills*, 123 F. 2d 725, 727 (C.A. 5) ("the question for decision [in civil contempt] is not one of the intent with which, but simply whether, certain acts were done"), cited with approval in *National Labor Relations Board* v. *J.P. Stevens & Co., Inc.*, 538 F. 2d 1152, 1162 (C.A. 5). Accord: *National Labor Relations Board* v. *Crown Laundry & Dry Cleaners, Inc.*, 437 F. 2d 290, 293 (C.A. 5).

2. Nor is there substance in petitioner's contention (Pet. 15-28) that the provisions of the contempt order are improper. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb* v. *Jacksonville Paper Co.*, *supra*, 336 U.S. at 193. The terms of the order here are not unique and are a reasonable means of assuring compliance with the underlying enforcement decree.

(a) *Notice-posting and mailing* — It is long settled that "the posting of notices advising the employees of the [court's] order and announcing the readiness of the employer to obey it is within the [court's] authority." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 438, and cases cited therein. The purpose of the notice here is not to embarrass Angle but to "inform the employees of their rights, how these rights were violated, and by what process they have been upheld * * * ." *Bilyeu Motor Corp.*, 161 NLRB 982, 983, enforced, 391 F. 2d 928 (C.A. 5). See also *Spartan Industries, Inc.* v. *National Labor Relations Board*, 406 F.

Nor can there be any doubt that Angle was responsible for the coercive acts of Al Pesicka, the "highest ranking management official at the plant" (Pet. App. A39). See *National Labor Relations Board* v. *Crown Laundry & Dry Cleaners, Inc.*, *supra*, 437 F. 2d at 293, and cases cited by the court at Pet. App. A38-A39. As the court stated (Pet. App. A39), "rather than repudiating Pesicka's authority, Angle had reaffirmed it; and the evidence suggests that there was in fact authorization and ratification by Angle of Pesicka's activities, rather than a direction to desist from such conduct. In these circumstances, there can be little doubt that employees would reasonably attribute the activities of Pesicka to Angle and that Angle never made a sufficient effort to ensure Pesicka's compliance with the Court's order" (record references and footnote omitted). Petitioner's suggestion (Pet. 14-15) that a stricter showing of Angle's responsibility was required is, as the court noted (Pet. App. A38), "merely a variant of the broader contention that lack of wilfulness prevents an adjudication in civil contempt, a view we have already rejected."

2d 1002, 1006 (C.A. 5).[6] Such notice requirements have uniformly been upheld in civil contempt proceedings as a legitimate means of insuring purgation.[7]

(b) *Bargaining requirement* — Contrary to petitioner's contention (Pet. 26-28), the court's bargaining order does not require Angle to bargain with the Union "into infinity." Rather, it is well-established that, following entry of a court decree requiring an employer to bargain with a union, the employer can satisfy its obligation by bargaining in good faith with the union for a reasonable period of time. *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112.[8] See also *Franks Bros.* v.

[6]Although, as petitioner points out (Pet. 19-20), the Second and District of Columbia Circuits, in the cases cited, struck down the requirement that the employer read notices to employees in part because of the undue embarrassment it would cause the employer, both of these courts upheld the Board's posting requirement. Moreover, the Second Circuit in the very case relied upon by petitioner, and other courts as well, have upheld even the reading requirement if the employer is permitted at its option to have a Board, rather than its own, representative read the notice on plant premises. See *J.P. Stevens & Co., Inc.* v. *National Labor Relations Board*, 406 F. 2d 1017, 1021-1022 (C.A. 4); *J.P. Stevens & Co., Inc.* v. *National Labor Relations Board*, 417 F. 2d 533, 539-540 (C.A. 5).

[7]See, *e.g.*, *National Labor Relations Board* v. *Schill Steel Products, Inc.*, 480 F. 2d 586, 598-600 (C.A. 5); *National Labor Relations Board* v. *Ralph Printing & Lithographing Company*, 433 F. 2d 1058, 1064 (C.A. 8), certiorari denied, 401 U.S. 925; *National Labor Relations Board* v. *Merrill*, 414 F. 2d 1323, 1326 (C.A. 10); *National Labor Relations Board* v. *Hickman Garment*, 471 F. 2d 611 (C.A. 6); *Flambeau Plastics Corp.* v. *National Labor Relations Board*, 82 LRRM 2391, 2392 (C.A. 7); *National Labor Relations Board* v. *Sheridan Creations, Inc.*, 384 F. 2d 696, 697 (C.A. 2); *West Texas Utilities Co.* v. *National Labor Relations Board*, 206 F. 2d 442, 448 (C.A. D.C.), certiorari denied, 346 U.S. 855; *National Labor Relations Board* v. *Weirton Steel Co.*, 183 F. 2d 584, 585 (C.A. 3).

[8]Accord: *National Labor Relations Board* v. *Schill Steel Products, Inc.*, *supra*, 480 F. 2d at 591; *National Labor Relations Board* v.

National Labor Relations Board, 321 U.S. 702, 705-706; *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 613. Petitioner, however, cannot rely on the lapse of time to excuse its bargaining obligation, where, as here, it did not bargain in good faith and engaged in other unfair labor practices. *Franks Bros. Co.*, *supra*, 321 at 705; *Gissel Packing Co.*, *supra*, 395 U.S. at 610-611.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Lynair, Inc., 380 F. 2d 286, 288-289 (C.A. 6); *National Labor Relations Board* v. *Savoy Laundry Inc.*, 354 F. 2d 78, 80-81 (C.A. 2); *National Labor Relations Board* v. *Vander Wal*, 316 F. 2d 631, 633-634 (C.A. 9).

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